

EXECUTIVE OFFICER SUMMARY REPORT
November 18, 2009

ITEM: 12

SUBJECT: PUBLIC HEARING: Reissuance of NPDES Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the watersheds of the County of Orange, the Orange County Flood Control District, and the incorporated Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano within the San Diego Region. (Tentative Order No. R9-2009-0002, formerly Tentative Order Nos. R9-2008-0001 & R9-2007-0002, NPDES Permit No. CAS0108740) (*Ben Neill*)

The public review and comment period for the fifth version of the Tentative Order began on August 12, 2009. Written comments received by 5:00 p.m. on September 28, 2009 will be provided to the Regional Board members for their consideration prior to the hearing. Oral comments will be accepted on the fifth version of the Tentative Order. As noted in the public hearing notice, commenters are expected to orally summarize their comment(s) and not to raise new issues that could have been raised in timely written comments. Time allotted for oral comments may be limited at the discretion of the Regional Board presiding officer.

PURPOSE: Today's public hearing provides the Regional Board with the opportunity to hear public testimony on Tentative Order No. R9-2009-0002 and consider adoption of the Tentative Order.

PUBLIC NOTICE: Interested persons and the public have been notified in accordance with California Water Code Section 13167.5, the State Water Resources Control Board Administrative Procedures Manual (Chapter 1), and Code of Federal Regulations Title 40 CFR Part 25.

- A notice of this item was distributed to all known interested persons and posted on the Regional Board web site on October 01, 2009;

- A notice of this meeting was also posted for the general public in the Orange County Register on October 09, 2009; and in the San Diego Union Tribune on October 08, 2009; and
- A notice was included on the November 18, 2009 Regional Board meeting agenda.

DISCUSSION:

Tentative Order No. R9-2009-0002 is the proposed reissuance of the Municipal Storm Water Permit (Order No. 2002-01) for Southern Orange County. The Tentative Order serves as both Waste Discharge Requirements and as a federal National Pollutant Discharge Elimination System permit.

The Tentative Order would, if adopted, require the County of Orange, the Orange County Flood Control District, and the 11 incorporated cities of Orange County in the San Diego Region (Copermittees) to prohibit the discharge of non-storm water from their separate storm sewer systems (MS4s) and to reduce the discharge of pollutants in storm water from their MS4 to the maximum extent practicable (MEP). These requirements are mandated by Clean Water Act Section 402(p).

Background and Permitting Approach Summary

The revised Tentative Order (No. R9-2009-0002) being considered today was distributed for review and comment on August 12, 2009. This is the fifth version of the Tentative Order. The original Tentative Order was initially distributed over two years ago as Tentative Order R9-2007-002. In the process to renew the current Order (R9-2002-0001), the Regional Board has received written comments from 60 commenters and responded in writing to over 1,200 comments. Regional Board staff met separately with the Copermittees on 6 occasions, staff from other Southern California Regional Boards on 3 occasions, and the United States Environmental Protection Agency (USEPA) on 2 occasions. A total of 4 public workshops and 3 Regional Board hearings have been held on the Tentative Order.

Tentative Order No. R9-2009-0002 was initially distributed on February 9, 2007 as Tentative Order No. R9-2007-0002. A public workshop was held on March 12, 2007, and a public hearing on the Tentative Order was held before a Panel of

four Regional Board members on April 11, 2007 at a meeting in the City Council chambers of the City of Mission Viejo.

At the April 11, 2007 public hearing, the Regional Board panel directed staff to provide written responses to significant comments and distribute a revised Tentative Order approximately 45 days in advance of the meeting at which the full Regional Board would consider adoption of the revised Tentative Order. The Board panel further directed staff to accept written comments on subsequent revisions made to the Tentative Order. The panel, however, did not specifically direct staff to provide written responses to those later comments. Responses to all significant comments on the revisions, however, were provided in writing and/or verbally to the Regional Board.

On July 6, 2007, a second version of the Tentative Order, with a revised Fact Sheet and responses to comments, was distributed. Comments were accepted on the revisions until August 25, 2007. Consideration by the Regional Board of the revised Tentative Order was scheduled to occur in September 2007, but was delayed until a quorum of voting members would be present. The delay provided an opportunity to distribute a third version of the Tentative Order.

The third version of the Tentative Order (R9-2008-0001) was distributed to interested persons and the general public on December 12, 2007. At the February 13, 2008 regular meeting, a third written response to comments was distributed. A motion to adopt the third version of the Tentative Order failed to pass by a vote of 2 to 3. The Regional Board instructed staff:

- to seek greater emphasis on measurable performance based criteria;
- to reevaluate the low impact development and hydromodification requirements;
- to examine consistency between Southern California MS4 permits;
- to remove from the Tentative Order the regulation of facilities that extract, treat and discharge; and
- to include all applicable Total Maximum Daily Load Waste Load Allocations adopted by the Regional Board and approved by the USEPA.

Following considerable revision, a fourth version of the Tentative Order (R9-2009-0002), incorporating the Regional Board's directions, was distributed to interested persons and the public on March 13, 2009. A public workshop was held on April 3, 2009 at the City of Mission Viejo. At the request of the Copermittees, Regional Board staff met separately with them on April 16, 2009, April 20, 2009, and May 12, 2009. Further public meetings were held on May 6, 2009 and May 26, 2009. On July 01, 2009 the Regional Board held the third public hearing on the Tentative Order in Dana Point. The Regional Board did not take action, but directed staff to incorporate proposed updates and revisions to the Tentative Order and to release a fifth version for public comment. By request, Regional Board staff met again with the Copermittees on July 15, 2009 and with USEPA on September 22, 2009.

A fifth version of the Tentative Order (R9-2009-0002) was distributed to interested persons and the general public on August 12, 2009 (Supporting Document No. 1). A draft update and errata, in response to comments received, to the fifth version of the Tentative Order (R9-2009-0002) is included (Supporting Document No. 2). The fact sheet for the fifth version of the Tentative Order is included as Supporting Document No. 3. A map of the Orange County jurisdictional area within the San Diego Region is included as Supporting Document No. 4. A timeline of the background process is provided as Supporting Document No. 5. A draft response to written comments received between May 15 and September 28, 2009 is included (Supporting Document No. 6). A Regional Board Counsel Memorandum (dated November 05, 2009) is included as Supporting Document No. 7 and specifically addresses legal issues. Written comments on the fifth version of the Tentative Order received from May 15 to September 28, 2009 are provided as Supporting Document No. 8. A notice of today's public meeting (Supporting Document No. 9) was distributed on October 01, 2009.

Availability of Documents

The agenda materials from the April 11, 2007 Panel Hearing and the February 13, 2008 adoption hearing are available from the Regional Board meetings web page:
http://www.waterboards.ca.gov/sandiego/board_info/agendas/

Other material related to the Tentative Order is available from the Regional Board web page dedicated to the Orange County MS4 Permit:

http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html. This web page includes copies of all comments, responses to comments, and revisions to the Tentative Order and Fact Sheet.

Revisions to Tentative Order No. R9-2009-0002

Minor revisions to Tentative Order No. R9-2009-0002 made since the July 01, 2009 Regional Board hearing are included as Supporting Document 2. The changes are made either in response to comments received and/or to correct typographical errors.

Comments on the Revised Tentative Order

1. Original Tentative Order. Written comments on the original Tentative Order were accepted through April 25, 2007. Written comments received prior to the April 4, 2007 Panel Hearing were provided to the Board members in the agenda materials for that date. Written comments received after April 5, 2007 were provided at the July 01, 2009 public hearing and are available at http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html.
2. Second Version of the Tentative Order. All written comments received before August 23, 2007 on the July 2007 revised Tentative Order were provided at the July 01, 2009 public hearing and are available at http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html.
3. Third Version of the Tentative Order. All written comments received before January 24, 2008 on the second revised Tentative Order were provided at the July 01, 2009 public hearing and are available at http://www.waterboards.ca.gov/sandiego/programs/oc_storm_water.html.

4. Written responses to comments received prior to March 13, 2009 on the first three versions of the Tentative Order were provided at the July 01, 2009 public hearing and are available at:
http://www.waterboards.ca.gov/sandiego/programs/oc_stormwater.html.
5. Fourth Version of the Tentative Order. All written comments received before May 15, 2009 were provided at the July 01, 2009 public hearing and are available at
http://www.waterboards.ca.gov/sandiego/programs/oc_stormwater.html.
6. Fifth Version of the Tentative Order. All written comments received before September 28, 2009 are provided in Supporting Document No. 8. A draft response to those comments is provided in Supporting Document No. 6.

Procedures for Today's Meeting

The purpose of today's item is to consider comments on Tentative Order No. R9-2009-0002, as modified. Oral comments will be accepted on modifications made to the Tentative Order following the initial public hearing. Staff will provide verbal responses to significant public comments raised on revisions to the Tentative Order.

KEY ISSUES:

Based upon review of written comments submitted on the fifth revision of the Tentative Order, the following issues are of continued significant concern. Previous public hearings on this item vetted all these issues. Additional issues may be identified in the Supplemental Executive Officer's Summary Report following review of additional comments received after May 15, 2009.

1. Over irrigation prohibition – The Copermittees are concerned about the practicality of enforcing such a prohibition. The Copermittees are opposed to removal of the current exemption of the prohibition against over-irrigation discharges. USEPA supports removal of the exemption.
2. Facilities that extract, treat, and discharge (FETDs) – The Copermittees are concerned with how discharges from FETDs will be regulated since they are no longer regulated as a BMP through the MS4 permit. These regulations were removed upon the direction of the Regional Board.

3. Numeric Effluent Limitations – Copermittees are concerned with potential Regional Board enforcement actions resulting from violation of the effluent limitations. Copermittees are opposed to using numeric effluent limitations as a measureable performance based criteria. Furthermore, the Copermittees allege that non-storm water discharges should be subject to the MEP standard. The USEPA supports the proposed numeric effluent limitations for non-storm water discharges.
4. Storm water Action Levels – Copermittees are concerned with the development of the action levels. Some Copermittees are opposed to using storm water action levels as a measureable performance based criteria. The USEPA supports the proposed storm water action levels.
5. Retrofitting Existing Development – The Copermittees are concerned about the feasibility of implementing a retrofitting program for privately owned development. Many Copermittees are opposed to the requirement to explore retrofitting opportunities for existing development. The USEPA supports the proposed retrofitting requirements.
6. Low-Impact Development – The USEPA and the Natural Resources Defense Council recommended that requirements pertaining to low-impact development (LID) include specific performance criteria. The Tentative Order establishes a numeric design-storm standard.
7. Unreasonable Expense – Several Copermittees expressed concerns that the new requirements in the Tentative Order are unnecessary and will be cost prohibitive to implement.

LEGAL CONCERNS: None.

SUPPORTING DOCUMENTS:

1. Revised Tentative Order No. R9-2009-0002, with attachments
2. Draft Updates and Errata for the revised Tentative Order
3. Fact Sheet / Technical Report for Tentative Order No. R9-2009-0002
4. Map of Orange County within the San Diego Region
5. Timeline of Events

6. Draft Responses to written comments on Tentative Order No. R9-2009-0002 received between May 15 and September 28, 2009
7. Regional Board Counsel Memorandum dated November 05, 2009
8. Comments received between March 15 and September 28, 2009 on the fifth version of the Tentative Order
9. Notice of Public Hearing

RECOMMENDATION:

It is recommended that the Board receive public testimony at today's hearing, close the public comment period, and adopt the Tentative Order (with updates and errata).

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